

Hon. John H. Chun

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KURT BENSHOOF, et al.,

No.: 2:24-CV-00808-JHC

Plaintiffs,

V.

PLAINTIFFS' MOTION TO DISQUALIFY
COUNSEL (CONFLICT OF INTEREST)

ANDREA CHIN, et al.,

Defendants.

I. INTRODUCTION

Pursuant to Local Civil Rule 7, Plaintiffs move this Court to disqualify counsel Sarah N. Turner and Michael C. Tracy from further representing Defendants Nathan Cliber and Blair Russ due to significant conflicts of interest and the resulting prejudice to Plaintiffs. Turner and Tracy currently serve simultaneously as both pro se defendants and counsel for Defendants Cliber and Russ creating substantial ethical conflicts and confusion that will prejudice Plaintiffs' right to a fair trial.

II. FACTUAL BACKGROUND

33 Plaintiffs initiated this suit alleging multiple constitutional and statutory violations
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35 by several defendants, including attorneys Sarah N. Turner and Michael C. Tracy, sued

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1 individually for acts of misconduct involving Defendants Nathan Cliber and Blair
 2
 3 Russ.
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5 Attorneys Sarah Turner and Michael Tracy currently represent Defendants Nathan
 6
 7 Cliber and Blair Russ in this litigation. Attorneys Turner and Tracy filed notices of
 8 appearance [Doc. No. 80] and motions on behalf of Defendants Cliber and Russ in this
 9 proceeding, despite being individually named defendants themselves.
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 11

12 Turner and Tracy, acting as counsel, have filed pleadings on behalf of Defendants
 13
 14 Cliber and Russ, despite simultaneously being named individually as defendants for
 15
 16 alleged misconduct relating to the same facts underlying Plaintiffs' claims.
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19 **III. LEGAL ARGUMENT**
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21 **A. Impermissible Conflict of Interest¹ (RPC 1.7(a)(1))**
 22

23 Washington RPC 1.7(a)(1) prohibits representation when:
 24
 25

26 "the representation of one client will be directly adverse to another client."

27 Representing Opposing Parties in Same Lawsuit Representation of opposing persons
 28 in the same lawsuit is prohibited by Rule 1.7(a) 1); this conflict is not waivable. Rule
 29 1.7(b)(3); see, e.g., *Ex parte Osbon*, 888 So. 2d 1236 (Ala. 2004) (in divorce proceeding,
 30 husband's lawyer subpoenaed wife's records from mental health agency; lawyer's partner
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¹ Rule 1.7 Conflict of Interests. Ellen J. Bennett, Helen W. Gunnarsson. Annotated Model Rules of Professional Conduct (9th ed., 2019) (Kindle Locations 4233-4240; 4288-4290) American Bar Association.

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1 responded on behalf of agency)

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3 **B. Impermissible Conflict of Interest (RPC 1.7(a)(2))**

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5 Washington RPC 1.7(a)(2) prohibits representation when:

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8 “there is a significant risk that the representation of one or more clients will

9 be materially limited by the lawyer's personal interests.”

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11

12 Because Turner and Tracy are named defendants whose personal interests are

13 directly implicated by the outcome of claims involving Defendants Cliber and Russ, their

14 ability to objectively and zealously represent Defendants Cliber and Russ is materially

15 compromised. Their representation directly violates RPC 1.7(a)(1) and RPC 1.7(a)(2).

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18 **C. Prohibited Representations - Rule 1.7**

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20 Ordinarily, clients may consent to representation notwithstanding a conflict.

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22 However, as indicated in paragraph (b), some conflicts are nonconsentable,

23 meaning that the lawyer involved cannot properly ask for such agreement or provide

24 representation on the basis of the client's consent. When the lawyer is representing more

25 than one client, the question of consentability must be resolved as to each client.

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28 Consentability is typically determined by considering whether the interests of the

29 clients will be adequately protected if the clients are permitted to give their informed

30 consent to representation burdened by a conflict of interest.

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1 Thus, under paragraph (b)(1), representation is prohibited if in the circumstances
 2 the lawyer cannot reasonably conclude that the lawyer will be able to provide competent
 3 and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).²
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 5

6
 7 Paragraph (b)(3) describes conflicts that are nonconsentable because of the
 8 institutional interest in vigorous development of each client's position when the clients are
 9 aligned directly against each other in the same litigation or other proceeding before a
 10 tribunal. Whether clients are aligned directly against each other within the meaning of this
 11 paragraph requires examination of the context of the proceeding.³
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 13

14 **D. Lawyer as Witness (RPC 3.7)**
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 18 RPC 3.7 prohibits attorneys from acting as advocates at a trial where they are likely
 19 to be necessary witnesses. Attorneys Turner and Tracy will inevitably become witnesses
 20 regarding their own alleged conduct and knowledge of underlying facts, creating
 21 impermissible dual roles. Their testimony is critical to proving Plaintiffs' claims, making
 22 their continued representation improper and unethical.
 23
 24

25 The rules and supporting case law is not in "favor" of allowing pro se defendant(s),
 26 to be attorney(s) of record for their co-defendants, which is not only prejudicial to the co-
 27 defendants but also to the opposing parties which in this case are the Plaintiffs.
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 35 ² Ellen J. Bennett, Helen W. Gunnarsson. Annotated Model Rules of Professional Conduct
 (9th ed., 2019) (Kindle Locations 4233-4240). American Bar Association.

36 ³ Ellen J. Bennett, Helen W. Gunnarsson. Annotated Model Rules of Professional Conduct
 (9th ed., 2019) (Kindle Locations 4245-4248). American Bar Association.

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1 *Suchite v. Kleppin*, 784 F. Supp. 2d 1343 (S.D. Fla. 2011) (lawyer disqualified
 2 from representing co-defendants but not from representing self at trial)
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 6 *State ex rel. Neb. State Bar Ass 'n v. Neumeister*, 449 N.W. 2d 17 (Neb. 1989)
 7
 8 (lawyer suspended for not withdrawing; trial court's failure to disqualify "will not exonerate
 9 him from discipline where it is found that his conduct is in violation of disciplinary rules").
 10
 11 See generally *Douglas R. Richmond, Lawyers as Witnesses*, 36 N.M. L. Rev. 47 (Winter
 12 2006).
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 16 **E. Lawyer May Not Act as Advocate at Trial if Likely to Be Necessary Witness**
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 19 Rule 3.7 requires disqualification when it is "likely" the lawyer will be a "necessary"
 20
 21 witness. *In re Gibrick*, 562 B.R. 183 (Bankr. N.D. Ill. 2017) (courts have "variously
 22 described" circumstances under which lawyer is necessary witness, such as when it is
 23 "foreseeable"; when lawyer is aware of facts making it "obligatory" for him to testify; when
 24 lawyer has "crucial information [that] must be divulged"; and when lawyer's testimony is
 25 "essential to the case"; collecting cases).
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 27

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 29 **F. When Lawyer-Witness Is Also Litigant**
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 32 The rationales of the advocate-witness rule do not apply to the prose lawyer-litigant.
 33
 34 See *Duncan v. Poythress*, 777 F. 2d 1508 (11th Cir. 1985);
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1 1 *Suchite v. Kleppin*, 784 F. Supp. 2d 1343 (S.D. Fla. 2011) (lawyer disqualified from
 2 representing co-defendants but not from representing self at trial);⁴
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 4

5 5 **G. Prejudice to Plaintiffs and Jury Confusion**
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8 8 Allowing Turner and Tracy to simultaneously serve as defendants and attorneys
 9 presents a substantial and unfair prejudice to Plaintiffs by confusing and misleading the
 10 jury. Jurors cannot reasonably distinguish when these attorneys are acting as advocates
 11 versus when they are testifying or defending themselves as witnesses or defendants. This
 12 dual capacity compromises the jury's ability to fairly assess witness credibility and
 13 undermines the integrity and fairness of the trial.
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16 16 Courts consistently recognize this as impermissible, as it violates fundamental
 17 fairness and due process rights, and unduly prejudices Plaintiffs' right to a fair trial.
 18
 19

20 20 When a lawyer takes on both roles, jurors are likely to be confused about
 21 "whether statement by an advocate-witness should be taken as proof or as an analysis of
 22 the proof." Rule 3.7, cmt. [2].⁵
 23
 24

25 25 Confusion regarding the lawyer's role could prejudice a party or call into
 26 question the impartiality of the judicial process itself. See *People v. Rivera*, 986 N.E. 2d
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 34 4 Ellen J. Bennett, Helen W. Gunnarsson. Annotated Model Rules of Professional Conduct
 35 (9th ed., 2019) (Kindle Locations 11438-11439). American Bar Association.

5 Ellen J. Bennett, Helen W. Gunnarsson. Annotated Model Rules of Professional Conduct
 (9th ed., 2019) (Kindle Locations 11217-11222). American Bar Association
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1 634 (Ill. 2013) (rule protects against possibility that "attorney-witness may not be a fully
 2 objective witness, causing harm to the client's cause, or the trier of fact may grant undue
 3 weight to the attorney's testimony, unfairly disadvantaging the opposing party")
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 7 "The right to confront, cross-examine, and impeach adverse witnesses is
 8 one of the most fundamental rights sought to be preserved by the Seventh
 9 Amendment provision for jury trials in civil cases." *Adickes v. Kress & Co.*,
 10 398 U.S. 144, 176 (1970).
 11
 12

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 15 *Jensen v. Poindexter*, 352 P. 3d 1201 (Okla. 2015) (rule protects integrity of
 16 judicial process by eliminating possibility that lawyer will not be an objective
 17 witness, reducing risk that fact-finder may confuse roles of witness and advocate,
 18 and promoting public confidence in a fair judicial system); *see also Smith v.*
 19 *Wharton*, 78 S.W. 3d 79 (Ark. 2002) (by sitting with trial counsel and actively
 20 participating in trial though he expected to testify, lawyer "reassumed his role as an
 21 advocate" and therefore should not have been allowed to testify; appellate court
 22 would disregard his testimony and would send copy of its opinion to disciplinary
 23 committee);
 24
 25

26
 27 *State ex rel. Neb. State Bar Ass 'n v. Neumeister*, 449 N.W. 2d 17 (Neb. 1989)
 28 (lawyer suspended for not withdrawing; trial court's failure to disqualify "will not
 29 exonerate him from discipline where it is found that his conduct is in violation of
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1 disciplinary rules'). *See generally Douglas R. Richmond, Lawyers as Witnesses*, 36
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3 N.M. L. Rev. 47 (Winter 2006).

4 Because the advocate-witness rule protects opposing parties and the integrity
5 of the judicial system as a whole, the client's consent to the representation or
6 willingness to forgo the lawyer's testimony will not prevent disqualification if the
7 lawyer's testimony is deemed "necessary." *See Premium Prods., Inc. v. Pro*
8 *Performance Sports, LLC*, 997 F. Supp. 2d 433 (E.D. Va. 2014) (rule "not subject to
9 client waiver because the interests served by the rule extend beyond those of a single
10 client");

11 *MacArthur v. Bank of N Y.*, 524 F. Supp. 1205 (S.D.N.Y. 1981) (disqualifying
12 defendant bank's law firm despite bank's willingness to stay with firm and forgo its
13 lawyer's necessary testimony; bank could obtain other counsel, but could not obtain
14 substitute for his testimony).

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17 The jury's confusion would severely prejudice Plaintiffs, thereby requiring
18 disqualification of counsel.

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H. Rule 3.3 Candor Toward the Tribunal

24 This Rule sets forth the special duties of lawyers as officers of the court to avoid
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26 conduct that undermines the integrity of the adjudicative process.

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30 A lawyer acting as an advocate in an adjudicative proceeding has an obligation to
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1 Present the client's case with persuasive force. Performance of that duty while maintaining
 2 confidences of the client, however, is qualified by the advocate's duty of candor to the
 3 tribunal. Consequently, although a lawyer in an adversary proceeding is not required to
 4 present an impartial exposition of the law or to vouch for the evidence submitted in a cause,
 5 the lawyer must not allow the tribunal to be misled by false statements of law or fact or
 6 evidence that the lawyer knows to be false.⁶
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11 **I. Representations by a Lawyer**

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14 An advocate is responsible for pleadings and other documents prepared for
 15
 16 litigation, but is usually not required to have personal knowledge of matters asserted
 17 therein, for litigation documents ordinarily present assertions by the client, or by someone
 18 on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1.
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 20

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22 However, an assertion purporting to be on the lawyer's own knowledge, as in an
 23
 24 affidavit by the lawyer or in a statement in open court, may properly be made only when
 25 the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably
 26 diligent inquiry. There are circumstances where failure to make a disclosure is the
 27
 28 equivalent of an affirmative misrepresentation.⁷
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32 **J. Statements Made In Representing Client**

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35 ⁶ Ellen J. Bennett, Helen W. Gunnarsson. Annotated Model Rules of Professional Conduct
 (9th ed., 2019) (Kindle Locations 9783-9788). American Bar Association.

⁷ Ellen J. Bennett, Helen W. Gunnarsson. Annotated Model Rules of Professional Conduct
 (9th ed., 2019) (Kindle Locations 9789-9794). American Bar Association

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1 Rule 3.3(a)(1) prohibits a lawyer from knowingly making a false statement of
 2
 3 fact or law to a tribunal- whether material or not, whether oral or written, and whether in
 4 an affidavit, a pleading, or another document. *See, e.g., Ligon v. Price*, 200 S.W. 3d 417
 5 (Ark. 2004).⁸
 6
 7
 8
 9 Douglas R. Richmond, *Lawyers' Professional Responsibilities and Liabilities in*
 10
 11
 12 *Negotiations*, 22 Geo. J. Legal Ethics 249 (Winter 2009) ("lawyer who violates Rule 3.3(a)
 13 necessarily violates Rule 8.4 (c) as well").⁹
 14
 15

K. Statements or Omissions that Mislead

18 Failure to make a disclosure can be "the equivalent of an affirmative
 19 misrepresentation." Rule 3.3, cmt. [3]. "Any differences between 'false' and 'misleading'
 20 statements are in-irrelevant for Rule 3.3(a)(1) purposes Courts routinely employ Rule
 21
 22 3.3(a)(1) and equivalent rules to discipline lawyers who have misled through their
 23 silence." Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23
 24 Rev. Litig. 301, 310-11 (Spring 2004). See, e.g.,
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29 *Kim v. 511 E. 5th St., LLC*, No. 12 Civ. 8096 (JCF), 2016 WL 6833928, 2016 BL
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35 ⁸ Ellen J. Bennett, Helen W. Gunnarsson. Annotated Model Rules of Professional Conduct
 (9th ed., 2019) (Kindle Locations 9899-9901). American Bar Association

9 ⁹ Ellen J. Bennett, Helen W. Gunnarsson. Annotated Model Rules of Professional Conduct
 (9th ed., 2019) (Kindle Locations 9932-9934). American Bar Association.

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1 391452 (S.D.N.Y. Nov. 7, 2016).¹⁰
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4 **L. Reporting Professional Misconduct- Rule 8.3**
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6 “**(a)** A lawyer who knows that another lawyer or LLLT has committed a violation of
 7 the applicable Rules of Professional Conduct that raises a substantial question as to
 8 that lawyer's or LLLT's honesty, trustworthiness or fitness as a lawyer or LLLT in
 9 other respects, should inform the appropriate professional authority.”

10 Although Rule 8.3 does not require a lawyer to report his or her own misconduct,
 11
 12 the lawyer must report the misconduct of others even if doing so would implicate the
 13 lawyer's own conduct as well. See, e.g., *In re Rivers*, 331 S.E. 2d 332 (S.C. 1984)
 14 (inexperienced lawyer helped his partner use private investigator to contact potential jurors;
 15
 16 lawyer disciplined for failing to report partner as well as for his own role)
 17
 18

19 A lawyer generally must report the misconduct of law firm colleagues and former
 20 law firm colleagues. See, e.g., *In re Rivers*, 761 S.E. 2d 234 (S.C. 2014) (reporting partner's
 21 trust account misappropriations only after learning of disciplinary agency's investigation);
 22
 23 ABA Formal Ethics Op. 03-429 (2003) (partner must report impaired associate's violation
 24
 25 of ethics rules).
 26
 27

28 Va. Ethics Op. 1886 (2017) (must report firm lawyer's misconduct involving
 29
 30 dishonesty even if lawyer is in treatment for substance abuse problem that contributed to
 31
 32
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34 ¹⁰ Ellen J. Bennett, Helen W. Gunnarsson. Annotated Model Rules of Professional Conduct
 35 (9th ed., 2019) (Kindle Locations 9935-9941). American Bar Association.

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1 misconduct); *see also Skolnick v. Alzheimer & Gray*, 730 N.E. 2d 4 (Ill. 2000) (trial court
 2 abused discretion by refusing to modify protective order so associate could report
 3 misconduct by firm's former partner);
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5
 6 *Cf. Estate of Spencer v. Gavin*, 946 A. 2d 1051 (N.J. Super. Ct. App. Div. 2008)

7 (Rule 8.3 duty of lawyer to report officemate's embezzlement "strengthens" court's
 8 conclusion that "inaction [can expose] him to civil liability to those who were harmed" by
 9 failure to report); Va. Ethics Op. 1887 (2017) (no requirement to report lawyer's
 10 impairment if representation is competent, but must report if impairment results in
 11 incompetent representation). See generally Cynthia L. Gendry, *An Attorney's Duty to*
 12 *Report the Professional Misconduct of Co-Workers*, 18 S. Ill. U. L.J. 603 (Spring 1994);
 13

14 Paragraph (b) requires that misconduct by a judge be reported to the appropriate
 15 authority. *Lisi v. Several Att'ys*, 596 A. 2d 313 (R.I. 1991) (lawyers' loans to judge violated
 16 Rule 3.5; lawyers' failure to report judge violated Rule 8.3); *see also Ohio Sup. Ct. Ethics*
 17 *Op. 2017-2* (2017) (Judge must report misconduct of lawyer or another judge)
 18

19 **M. Rule 8.4 Misconduct**

20 It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules
 21 of Professional Conduct, knowingly assist or induce another to do so, or do so through the
 22 acts of another;

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1 "Paragraph (a): Violating, Attempting to Violate, or Assisting in Violation of Ethics Rules"

2

3

4 Model Code, Rule 8.4(a) states that it misconduct even to attempt to violate an ethics rule.

5 *See People v. Katz*, 58 P. 3d 1176 (Colo. O.P.D.J. 2002) (attempted conversion of funds;

6

7

8 "The fortuitous discovery and frustration of [respondent's] intended misappropriation of
9 those funds does not lessen the seriousness of his actions.").

10

11

12 *In re Swarts*, 30 P. 3d 1011 (Kan. 2001) (attempt to falsify evidence).

13

14

15 Paragraph (a) prohibits a lawyer from knowingly assisting or inducing another to
16 violate the ethics rules, or from violating the rules through the acts of another. *See People*
17 *v. Cozier*, 74 P. 3d 531 (Colo. O.P.D.J. 2003) (lawyer asked notary public to notarize
18 signature neither had witnessed);

20

21

22 *In re Asher*, 772 A. 2d 1161 (D.C. 2001) (inducing another lawyer to lie to court).

23

24

25 Paragraph (c)' s prohibition of "conduct involving dishonesty, fraud, deceit or
26 misrepresentation" is broad and, like the other provisions of Rule 8.4, encompasses conduct
27
28 outside the practice of law. *See, e.g.*, *D.C. Ethics Op.* 336 (2006).

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32 A lawyer's intent or purpose to deceive is generally irrelevant to Rule 8.4(c). *See In*
33 *re Lawrence*, 884 So. 2d 561 (La. 2004) (lawyer who submitted false timesheets to firm
34 violated rule regardless of intent or motive); *State ex rel. Special Counsel v. Shapiro*, 665

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1 N.W. 2d 615 (Neb. 2003) (misrepresentation does not require proof of intent to deceive or
2
3 defraud).

4

5 *In re Dann*, 960 P. 2d 416 (Wash. 1998) (in determining whether lawyer violated Rule
6
7 8.4(c), "the question is whether the attorney lied"; motive irrelevant);
8

9
10 *cf. Att'y Grievance Comm'n v. Dore*, 73 A. 3d 161 (Md. 2013) (" dishonesty and
11 misrepresentation under Rule 8.4(c) have no requirement of intent to deceive"; intent to
12 deceive relevant only when fraud or deceit alleged).
13

14

15 **Behavior toward Courts, Opposing Parties, Their Counsel, or Witnesses Rule:**
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18 Lying to or misleading a court can violate Rule 8.4(d). *See In re Alcorn*, 41 P. 3d 600
19 (Ariz. 2002).
20

21

22 Rule 8.4 (d) encompasses abusive or uncivil behavior toward opposing counsel, as
23 well as parties and witnesses. *See In re Fletcher*, 424 F. 3d 783 (8th Cir. 2005) (pattern of
24 unprofessional conduct "in an attempt to harass, humiliate and intimidate deponents and
25 their counsel" by, for example, "selectively quoting deposition testimony in a way that
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29 grossly mischaracterized deponents' statements").
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IV. RELIEF REQUESTED

Plaintiffs respectfully request the following:

1. **Immediate disqualification** of attorneys Sarah Turner and Michael Tracy from representation of Defendants Nathan Cliber and Blair Russ; An evidentiary or oral argument hearing to fully address the prejudice to Plaintiffs and jury confusion issues arising from this conflict; and
2. Any additional relief the Court deems just and appropriate.

V. CONCLUSION

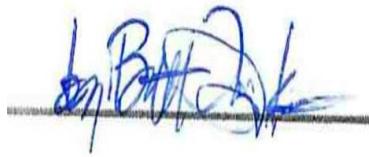
Due to the substantial ethical conflict under RPC 1.7, RPC 3.3, RPC 3.7, RPC 8.3, and RPC 8.4 - as well as the inherent jury prejudice from ambiguity in these attorneys' dual roles, this Court should immediately disqualify Sarah Turner and Michael Tracy from acting as counsel for Defendants Nathan Cliber and Blair Russ.

Respectfully submitted on this day of March 17, 2025, by Plaintiffs

Urve Maggitti, Plaintiff
244 Blackburn Drive, Berwyn, PA 19312
urve.maggitti@gmail.com

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Brett Fountain, Plaintiff
c/o 2100 W NW HWY 114 #1115
Grapevine, TX 76051-7808
kb407@exposelegalcorruption.com



Kurt Benshoof, Plaintiff
1716 N 128th Street
Seattle, WA 98133
King County Correctional Facility – Seattle
B/A 2024-008067, UCN# 10518097
500 Fifth Ave., Seattle, WA 98104
kurtbenshoof@gmail.com
Kurtbenshoof1@gmail.com

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Record Public Access Policy of the Unified Judicial System that require filing confidential information and documents differently than non-confidential information and documents

I certify that this MOTION contains 3110 words in compliance with the Local Civil Rules.

DATED: March 17, 2025.

Tom Nagy

Address: 244 Blackburn Drive, Berwyn, PA 19312
urve.maggitti@gmail.com

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